Supreme Court of the United States

October Term, 1942.

No. 116.

NIESCHLAG & CO., INC.,
Petitioner.

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HAROLD T. EDWARDS,
CHARLES A. ELLIS,
Counsel for Petitioner.

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CASES CITED.

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Reply Brief for Petitioner in Support of Petition for Writ of Certiorari.

I.

Respondent's Brief requires reply because it misstates the "Questions Presented", facts, errors specified, this petitioner's contentions, inapplicable statutory provisions of a *New York Insurance Law* not in effect during 1939*, and even the statutory* and (unpleaded) charter powers of respondent; and it is important that this Court be "not in any degree influenced" thereby (*Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578) to misapprehend peti-

*All statutory provisions cited and set forth in Appendix A and B of Respondent's Brief (pp. 5-6, 8, 10-13) are from an inapplicable *New York Insurance Law* approved June 15, 1939, L. 1939, Ch. 882, which §601 thereof specifically made effective Jan. 1, 1940, and are not from *New York Insurance Law* of 1909, L. 1909, Ch. 33, as amended, in effect throughout 1939 and in March, April and May, 1939, the dates involved in this controversy. *Cf.* Appendix, *infra*, pp. 18-20.

tioner's application. This is no less important whether or not it be "quite plain that there was no purpose to mislead"; the summary nature of proceedings *for* certiorari peculiarly require that respondent's Brief equally with the petition be prepared "with studied accuracy" to enable "ready and adequate understanding of points" requiring this Court's attention (*Furness, Withy & Co., Ltd.* v. *Yang-Tsze Ins. Assn., Ltd.*, 242 U. S. 430, 433-434).

Rule XXXVIII of this Court provides "The *petition* shall contain * * * the questions presented;" that respondent may file "an opposing brief," and that "Only the questions specifically brought forward by the *petition* for writ of certiorari will be considered" (Italics ours). This Court has repeatedly held that where, as here, petitioner alone applies for certiorari, the questions and conflicts for review are those set forth in the *petition*[1] or "incidental to their determination",[2] or otherwise "adequately raised by the *petition* though not specified formally"[3].

II.

A. The *Petition* herein "formally" specifies *five* basic and important "Questions Presented" (Petition, pp. 7-10), together with *nineteen* specifications of erroneous rulings below in conflict with decisions set forth in the Petition (Petition, pp. 10-20).

Respondent's Brief, though containing a section identically entitled "Questions Presented" (Respondent's Brief, pp. 4-5), does not reproduce nor summarize such

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1. *Lucas* v. *Alexander*, 279 U. S. 573, 576; *Lloyd Sabando Societa Anonima* v. *Elting*, 287 U. S. 329, 331; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Federal Trade Comm.* v. *Pacific Paper Assn.*, 273 U. S. 52, 66. Cf. *Langnes* v. *Green*, 282 U. S. 531, 537-538.

2. *Rorick* v. *Devon Syndicate*, 207 U. S. 299, 303.

3. *Public Service Comm.* v. *Havemeyer*, 296 U. S. 506, 509. (Italics ours.)

five nor address its opposition to their review. Rather, without indicating that they are of respondent's design and not comparable to those of the Petition, it sets up *two* so-called questions of entirely different tenor and argues their lack of merit or unimportance;—*i. e.*, "I.—Whether * * * a person having no insurable interest in goods insured against loss or damage under a marine policy and certificates issued thereunder cannot recover thereon" and "II.—Whether * * * insurance upon cocoa beans * * * can be converted into a guaranty bond * * *", or whether an issue of fact as to *this* was presented (Respondent's Brief, pp. 4-5).

The Petition presents no such questions and seeks no such review. In direct contrast, the "Questions Presented" by the Petition involve review among other points, of *whether* the "non-delivery" insurances, in their *intent, and meaning,* are, as matter of law, insurances of goods against loss or damage, as distinct from insurances indemnifying petitioner's undenied, *bona fide,* insurable "non-delivery" risk and loss, and *whether* as matter of law petitioner had no insurable interest; and review of whether the *summary determination* of these questions and issues made below is erroneous under the evidence and under Rules 56, 38 and 39, the Seventh Amendment, the laws of Bankruptcy, *res adjudicata,* insurance, the law and trade usage respecting "non-delivery" risk and insurance thereof, and controlling decisions cited in the Petition as in conflict with the decision below.

B. Respondent's Brief does not cite, discuss nor distinguish any decision specified in the Petition, nor deny that the decision below conflicts therewith. Instead, whereas the Petition cites warehousing, carrier and insurance cases involving "delivery", "non-delivery" and "lack of delivery", respondent criticizes petitioner for not citing instead *fire* or other property-peril insurance

cases contrary to *Miller* v. *Stuyvesant Insurance Co.*, 223 App. Div. 6, and present *New York Insurance Law*, §148 (Respondent's Brief, pp. 5, 6).

But the question this presents, as to the *Miller* decision and any statutory provision effective during 1939 (replaced by the inapplicable present *Insurance Law*, §148), is that of the applicability of their *fire* and property insurable-interest rules to the negotiable "non-delivery" risk insurances.

Miller v. *Stuyvesant Ins. Co.* was an "action on a *fire* insurance *policy*" (223 App. Div. 7; italics ours); and the Court carefully pointed out therein that "the varieties of insurable interest in the subject of a *fire policy* are limited" (223 App. Div. 9; italics ours).

Present *New York Insurance Law*, §148, quoted as Appendix A of respondent's Brief, replaced only from January 1, 1940, the first sentence of §55* of the 1909 *New York Insurance Law*, as amended, which was in effect throughout 1939. Such §55* (quite differently from present §148) prohibited *issuance* of any "policy" of insurance upon any "property" except upon application and in name of some person having "an interest" in the "property"; but contained no definition of insurable interest, no provision respecting enforceability and nothing applicable to either *issuance* or enforcement of negotiable *certificates* of special insurances by marine underwriters of non-feasance or chose-in-action marine *risks* such as "non-delivery".

In contrast with §55, and evidencing its inapplicability and the absence of any legislative purpose that it should apply to negotiable *certificate* insurances of such risks by marine underwriters, are the parallel, independent provisions of §169,* and the related provisions of §150,* of the same 1909 law, as amended.

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*Appendix, *infra*, pp. 18, 19.

Such §169 contained parallel, comprehensive provisions (independent of §55) prohibiting *issuance* of "any binder, cover note, *certificate,* policy or other evidence of a *contract of insurance* appertaining to or connected with *marine risks*" save on application and in name of some person having "a *bona fide* interest, direct *or indirect*" in the "*subject matter* insured, or a *bona fide expectation* of acquiring such an interest" (par. 1); and "unless such binder, cover note, *certificate,* policy or other evidence of a *contract of insurance* shall, at the time of such issuance * * * *represent a bona fide contract of insurance* appertaining to or connected with the *risks* hereinbefore specified and made by an insurance corporation or underwriter which is *obligated thereby by way of indemnity in case of loss*" (par. 3; italics ours). This followed the related §150, which, in par. 1, defined " 'marine insurance' and 'marine business' and 'marine *risks*' " to mean insurance against "*any and all kinds* of *loss of* or damage to", not only vessels, goods, freights, cargoes, disbursements, profits, moneys, securities, etc., but expressly "*choses in action*" (*cf. Ellicott* v. *The United States Insurance Co.,* Md., 8 Gill. & Johns. 116, 169); and all these "in *respect* to, *appertaining* to or in *connection* with *any and all risks* or perils of * * * storage * * * incident thereto" (Appendix, *infra,* pp. 18, 19; italics ours.)

Thus, of the law effective in 1939, §55 concerns "property" insurances by a "policy"—such as a *fire* policy; whereas §169 concerns, in parallel manner, independently and broadly, insurances of "risks" by any "* * * *certificate,* policy or other evidence of a contract of insurance". §55 specifies "an interest" in the "property" insured by the "policy"; whereas §169 specifies "a *bona fide* interest, direct *or indirect*" or "*a bona fide expectation* of acquiring such an interest" in the "*subject matter*" insured by the "*certificate*" or other form of "contract of insurance". The emphatic contrast, even as to

a "vessel", is the requirement, not of an interest *in* the vessel as property, but "in the safe *arrival* of the vessel," viz., some pecuniarily evaluable *risk* contingent thereon. Both sections concern *issuance*—and the duty of the insurer in connection with *issuance*—rather than enforcement of contracts issued; and §169 emphasizes this as to marine underwriters by expressly requiring the *issuer* to see to it that any *certificate* issued shall represent a *bona fide* contract of insurance *obligating* the insurer "by way of indemnity in case of loss" (all italics ours).

Respondent's misquotations—whether by studied effort or inadvertence—from *Insurance Law* provisions not even in effect in 1939, while omitting any reference to the foregoing provisions, are thus gravely misleading.

Moreover, in quoting *part* of par. 20 of the inapplicable present *Insurance Law*, §46 (Respondent's Brief, p. 13), respondent omits to quote *subpar.* (*a*) *thereof*, which replaces with few changes par. 1 of §150, above noted, of the *Insurance Law* effective during 1939. Respondent also omits to quote or refer to present §41, which contains the present broad New York statutory requirement as to insurability of any *risk* or "fortuitous event" of "occurrence or *failure to occur*"; and which the present §148 supplements with reference solely to insurances of "property". Present §41 defines an insurance contract as "any agreement or other transaction" whereby an insurer is obligated to confer benefit of pecuniary value upon another party, * * * *dependent* upon the happening of a fortuitous *event in which* the insured or beneficiary *has*, or *is expected to have at the time of such happening* a material interest which will be adversely affected by the happening of such *event*. A fortuitous event is any *occurrence or failure to occur* which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." (Italics ours.) Note

how closely this parallels, in comprehensiveness, the above noted provisions of old §169 in effect during 1939.

This new §41, though not in effect in 1939, thus codifies the law of decisions such as cited in the Petition (pp. 18-19) that "whatever *act, event or* property, bears such relation to the person seeking insurance, as that it can be said, with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition" may be insured.

"Fire" and "non-delivery" are each "a fortuitous *event in which*", in 1939 under these decisions and now under new §41, an insured must have insurable interest to support insurance thereof. But *fire* is a physical phenomenon, positive in operation, necessarily involving and which itself identifies some *res* which is burned or heated. By contrast, "non-delivery" is a default or non-feasance or "failure to occur", negative in operation, neither operating upon, nor capable of occurring nor definable with reference simply to a *res* which *its operation* will identify, nor except by reference to a delivery contract right or obligation; *i. e., inherently* it *"must* mean" non-occurrence of a delivery as required by a "contract" or obligation (*Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, 241 U. S. 190, 195).

For insurability, therefore, the one peculiarly requires substantially a *jus in re* whereas the other peculiarly requires a mere *jus ad rem* at most. In *The Carlos F. Roses*, 177 U .S. 655, 666, this Court, and in *The Young Mechanic*, C. C. Me. 1855, 2 Curtis 404, 412, Justice Curtis of this Court distinguished the two. "A *jus in re* is a right, or property in a thing, valid as against all mankind. A *jus ad rem* is a valid *claim on one or more persons to do something*, by force of which a *jus in re* will be acquired" (2 Curtis 412; italics ours). A *jus in re* without a *jus ad rem* will support *fire* insurance; but a *jus ad rem* without a *jus in re* will not. Present *Insurance*

Law, §148, former *Insurance Law,* §55, and *Miller* v. *Stuyvesant Ins. Co., supra,* simply establish and apply this point and are inapplicable here. By contrast, a *jus ad rem* without a *jus in re* will support "non-delivery" insurance; whereas a *jus in re* without a *jus ad rem* will not. Present *Insurance Law,* §41, former *Insurance Law,* §§169 and 150, par. 1, and the warehousing, carrier and insurance cases involving "delivery", "non-delivery" and "lack of delivery" cited in the Petition establish this.

Respondent's Brief here and its motion papers below do not question petitioner's *bona fide* ownership of such a *jus ad rem*—a valid, insurable "non-delivery" risk.

C. Respondent's Brief affirmatively misrepresents that this "*Petitioner argued*" and "*argues*" that the "non-delivery" insurances converted the insurance "into a surety bond * * * a guaranty of documents," "a guaranty of the warehouse receipts" (Respondent's Brief, pp. 4, 7, 8; italics ours).

In direct contrast, the Petition (p. 19) and supporting Brief (p. 44) show that "non-delivery" insurances, whether by bond, policy or certificate, never constitute suretyship or guaranty, but constitute indemnity insurances against insurable non-delivery risk, and that in confusing the "non-delivery" insurances as construed by petitioner with guaranty or suretyship, treating petitioner's contention as involving guaranty, and treating the issue as involving choice between guaranty or suretyship and property insurance of beans (with indemnity insurance against insurable "non-delivery" risk ignored), the decision conflicts with controlling decisions of this and other courts. Indeed, the decisions cited in the Petition (p. 19) and emphasized below (R. 165) establish that if such a contract be written in the *form* of a *guaranty* or *surety* bond, it will be held, even *contrary to such*

form, to be a contract of indemnity insurance against the risk instead.

Then, without plea, evidence or materiality, or any such holding below, respondent argues *ultra vires*, asserting that "In fact" respondent "is prohibited" by §§310 and 46 of the present *New York Insurance Law* and "by its charter, from writing guaranty bonds" (Respondent's Brief, p. 8).

The defense of *ultra vires* is one that comes with ill grace from an insurer, and is rarely raised by insurance corporations. But when raised, it is raised by plea and proof. Particularly subject to scrutiny, therefore, is its merit and motive when, without plea or evidence, it is advanced in argument as "fact" and coupled with misstatement, as petitioner's position, of the precise opposite of that stated in the Petition.

What respondent apparently relies on is the parenthetic clause in par. 20 (b) of the inapplicable present §46 reading "(but not including life insurance or *surety bonds* * * *)." (Italics ours; cf. §150, par. 1[b] of 1909 *Insurance Law*, as amended, in effect in 1939, Appendix, p. 19, *infra*). This parenthetic clause, originally reading "(but not including life insurances or surety or fidelity bonds)", was first inserted by L. 1921, c. 236, as part of a provision adding power to insure risks to person or property "arising out of construction, repair, operation, maintenance or use" of the subject matter of any marine "primary insurance". Actually, were the point material, this is no *prohibition*, but simply a limitation of the *added* power thus granted. For example, respondent's original special act charter (L. 1842, c. 217, April 11, 1842) itself grants in §2, par. 3, power "To make insurance on lives"; and this undeniable power is, not prohibited, but identically 'not included' in the above subpar. (b) grant.

But whereas the clause says that *"surety bonds"* are not included, the insurance here is not by *"surety* bond", nor even by *"bond"*, but is by marine *certificates;* it is not suretyship or guaranty, but *indemnity* against risk; and *if* under present law, §46, par. 16 (or in 1939 under corresponding par. 4 of §70 of 1909 *Insurance Law,* as amended) a surety or casualty company might also write it, their power to do so would be under *subpar.* (*e*) of §46, par. 16 (Respondent's Brief, Appendix, p. 13), (or under par. 4 of §70 of the law in effect in 1939). And present subpar. (e) and former par. 4 specify—not guaranty or suretyship—but insurance *"Indemnifying* banks, bankers, brokers, financial or monied corporations or associations" against risks no whit broader in its field than the "marine *risks"* broadly defined in §150, par. 1 (Appendix, *infra,* p. 18), of the law effective in 1939 [or subpar. (a), which respondent did not quote, of par. 20 of present §46], for the marine insurance field.

That part of par. 4 of §70 of the old law comparable to and from which new subpar. (e) of par. 20 of §46 derives, was first added by L. 1915, c. 505 (Appendix, *infra,* p. 20), entitled "AN ACT to amend the insurance law, in relation to *indemnifying certain* institutions and individuals against loss" (Italics ours). It was designed to enable surety companies, theretofore writing only suretyship and guaranty bonds, to write such *"indemnifying"* insurance as to the "certain" class specified, viz., banks, etc.; it expressly called the contract authorized a "contract or *indemnity indemnifying"* such class, and it expressly excepted and prohibited that "no such contract or *indemnity indemnifying"* such class should encroach on the parallel "marine risks" field, viz., no such contract should "indemnify against loss caused by *marine risks"* (Italics ours). If there were no "marine risks" of this character underwritable by marine insurance, why

this provision? Or, if any parallel risk contract was to be prohibited to marine underwriters as a "surety bond," why its emphatic characterization as "indemnity indemnifying"?

A modified prohibition continued in §70, par. 4, of the *Insurance Law* in effect during 1939, still using the expression "No such *indemnity indemnifying* against loss", etc. (italics ours). Whether or not during 1939 it sufficiently overlapped the definition of *marine* risks to have permitted surety company insurance *"indemnifying"* the "non-delivery" risk here, this does not convert, nor permit such insurances to be converted, into *suretyship* nor *surety bond,* but itself constitutes and *calls* them, regardless of form, "indemnity indemnifying" a risk; and this does not withdraw from the marine field any such "marine risks", including even the "choses in action" risks (*cf. Ellicott* v. *The United States Insurance Co., supra*) specified in §150, par. 1 of the 1909 law, as amended, in effect in 1939 [and in §46, par. 20 (a) of the new law effective January 1, 1940], and insurable by *"certificates"* of marine insurance.

Where, therefore, as here, the insurance is not written in the form of a guaranty or surety bond, but is written as indemnity insurance in form as well as effect, this is correct from the start; and petitioner's simple action for recovery thereon cannot and its arguments do not involve converting the correct indemnity form into incorrect surety or guaranty form.

D. Respondent's Brief nowhere refers to the First of the "Questions Presented" by the Petition, viz., *whether* the reclamation proceedings order is *res adjudicata,* conclusive evidence or any evidence whatever rebutting insurable interest in "non-delivery" risk (Petition, pp. 7-8). In direct contrast, it affirmatively represents the record as establishing that "In fact" there

"never were" any such cocoa beans, that the warehouse receipts were fraudulent and that petitioner had no "title" to any bags of cocoa described (Respondent's Brief, p. 4).

This Court "cannot, of course, take the intimation of counsel in the brief as evidence of a fact not appearing on the record" (*Hussman* v. *Durham,* 165 U. S. 144, 150). And for this assertion of "fact" respondent cites solely "(R. 93),"—the page of the record containing only the very bankruptcy proceedings order questioned.

The *Petition* and the *record* herein show that whereas both the warehouse receipts and the insurance (both negotiable) were issued and duly negotiated to the petitioner for value *in March and April, 1939,* and whereas even the "non-delivery" occurred *on May 24, 1939,* the omnibus reclamation order in bankruptcy adjudged *only* that of such residue of goods as still remained in warehouse and passed to Receivers *on May 29, 1939* when the Receivers took over, none thereof were beans of which petitioner was owner or entitled to possession (R. 93; Petition, pp. 6, 7). The "requisite" fact "indispensable" (*Harrison* v. *Remington Paper Co.,* CCA 8, 140 Fed. 385, 400; *Union Central Life Ins. Co.* v. *Drake,* CCA 8, 214 Fed. 536, 545) to a specie reclamation from the bankruptcy trustees that *they* as Receivers shall have received *on May 29, 1939* from the bankrupt beans then still existing and actually in warehouse *on May 29, 1939* (*cf. Jackson* v. *Hale,* 14 *How.* [55 U. S.] 525, 528)—*the sole issue determined by the reclamation order* (R. 93)—is a fact neither conclusive of nor material to claim for "non-delivery" by Harbor Stores Corporation *on May 24, 1939* under *March and April, 1939* receipts, delivery rights, risks and insurances, regardless of the latter's construction. Even "The time when the rights of the parties were fixed differed in the two causes" (*Harrison* v. *Remington Paper Co., supra*).

First, therefore, the question *whether* it was error to treat the reclamation order as adjudicating that there "never were" any such beans is most real, and is fully presented by the Petition, as a question of the meaning and effect of such *order*. Second, the question whether such order, or even an adjudication that there "never were" any such *beans*, can be material—as distinct from the proved and undenied, insurable "non-delivery" risk petitioner was under and understood was fully insured—is most real and is fully presented by the Petition, as a question of *intent and meaning of the "non-delivery" insurances*, the principles controlling determination thereof, and *whether* the summary determination below of the issue of their *intent and meaning* can stand. Neither such question may properly be thus suppressed.

E. Nowhere referring specifically to the Second of the "Questions Presented" in the Petition (p. 8), nor to the issues of fact, evidence and authorities cited in the Petition in connection therewith, respondent argues that "there was no issue of fact to go to the jury *as to whether* the insurance * * * upon cocoa beans * * * can * * * be converted into a guaranty bond" (Respondent's Brief, pp. 4, 5, 7). As above shown, this and respondent's arguments meet no contention of the Petition; but it is gravely misleading as suppressing the questions actually presented.

The Petition (pp. 8, 11-12, 22) and supporting Brief (pp. 35-41) show that not only the issue as to *intent and meaning* of the "non-delivery" insurances, as an issue of fact on respondent's motion, but direct issues of fact as to the surrounding facts and circumstances, and dependent upon the credibility of witnesses, were summarily determined; and petitioner's evidence, vital admissions by respondent and respondent's suppression of facts and witnesses were ignored. Respondent submitted

no counter affidavits opposing petitioner's cross-motion; but petitioner's affidavits were submitted both in support of its cross-motion and in opposition to respondent's motion. The issues determinable on both therefore, were not identical as respondent's Brief (p. 8) appears to claim. Adequate *undisputed* proof was presented by *petitioner* to require granting its cross-motion, but was ignored; whereas the very factual points claimed by respondent and the court to justify granting respondent's motion were adequately disproved or put in issue by petitioner's opposing papers, the facts in which were ignored. Moreover, if any factual point in respondent's affidavits were "not contradicted", yet "No court has power to determine the truth or falsity of the evidence of these interested witnesses" (*Piwowarski* v. *Cornwell,* 273 N. Y. 226, 229, and cases cited in Petition, pp. 11-12).

Respondent does not deny that in presenting no affidavits by Brust and Thurnall it suppressed important witnesses and facts which a *trial* would enable a jury to hear and petitioner to cross-examine (Petition, pp. 12, 14), nor the significance of this, under this Court's decisions, as itself "evidence of the most convincing character" for petitioner (Petitioner's supporting Brief, p. 41).

The Petition charges (p. 22), and respondent does not deny, that if this summary adjudication be approved, summary judgment procedure, contrary to Rules 56, 38 and 39 and the Seventh Amendment, will enable defendants, while suppressing witnesses and facts, to procure judgments of dismissal based on ignoring both plaintiff's own evidence, vital admissions by defendant and defendant's suppression of witnesses and facts, and on treating plaintiff's rights as dependent on merely what defendant chooses to urge. These novel questions, under the new Rules and the Seventh Amendment, concerning "a right so fundamental and sacred to the citizen"

(*Jacob* v. *City of New York,* 315 U. S. 752) cannot properly be thus suppressed or ignored as unimportant.

F. Respondent's Brief nowhere mentions the Third, Fourth and Fifth "Questions Presented" in the Petition (pp. 9-10), but asserts the action "is upon an open marine insurance *policy* on goods * * * and certificates * * * which insured bags of cocoa beans" (Respondent's Brief, p. 2; italics ours). It ignores the original holding herein by Knox, *D. J.,* that "Suit is based upon the covenants of" "defendant's *certificates* of insurance" (R. 155, f. 465; italics ours); and it never discusses the *questions* whether the "non-delivery" insurances are to be treated as made by, and the action as based on the *certificates,* nor whether the "non-delivery" insurance covenants of the certificates cover petitioner's undeniably insurable "non-delivery" risk.

It cites no case whatever involving whether "non-delivery" insurance, expressly made by specially added clauses of negotiable certificates, while not provided by but excluded from a separate non-negotiable policy, is to be treated as made solely by the *certificates* and not to be qualified, cut down or confused as to a *bona fide* endorsee by recourse to any *policy.* It does not deny that the summary determination below conflicts as to this with *Phoenix Ins. Co.* v. *De Monchy* (H. L.) 45 T. L. R. 543 (C. of A.) 44 T. L. R. 364 and *Aetna Ins. Co.* v *Willys Overland, Inc.,* 288 Fed. 912, and other decisions, as alleged in the Petition (pp. 9, 14).

It does not discuss nor suggest (nor did the courts below suggest) any *meaning* whatever for the "non-delivery" insurances, nor leave room for their having any meaning whatever. It cites no case whatever involving "non-delivery" insurance, nor any statute or rule of law applicable to "non-delivery" insurance. It does not deny that the summary determination below of the *intent and meaning* of "non-delivery", as insurable risk and

as risk insured, conflicts with the "non-delivery" decisions cited in the Petition, and in disregarding the meaning they establish conflicts with *The G. R. Booth,* 171 U. S. 450, 459-460, as alleged in the Petition (pp. 9, 16-17).

It does not deny that the express refusal below to apply the principle of liberal construction conflicts with *Bushey & Sons* v. *American Ins. Co.,* 237 N. Y. 24, as alleged in the Petition (pp. 9-10, 20).

Negotiable warehouse receipts and bills of lading are among the most important credit media of the world; and each alike carries a *jus ad rem;*—an insurable "non-delivery" indemnity *right* and *risk.* Today, with each alike there is negotiated throughout the world negotiable insurance certificates, specifically designed to be so negotiated. This "connotes the use of certificates to amounts running to many millions of dollars annually", all issued "for the primary purpose of being included with other documents used in financing" (*Thayer, Marine Insurance Certificates* [1935], 49 Harv. Law Rev. 239, 244). Of highest importance to merchants and underwriters alike, throughout the commercial world, is whether "non-delivery" insurances contained in specially added covenants of such *negotiable certificates* cover (in accord particularly with *The G. R. Booth, Phoenix Ins. Co.* v. *DeMonchy, supra,* former *Insurance Law,* §§169 and 150, par. 1, present *Insurance Law,* §§41 and 46[20] [a], and the "lack of delivery" decisions cited in the Petition), the insurable "non-delivery" *risk* evidenced by accompanying warehouse receipts or bill of lading, with the same meaning "non-delivery" has thereunder; or whether such "non-delivery" risk is not effectively insurable by indemnity underwriters, or is insurable only by indemnity bond separate from indemnity certificate, or has, contrary to *The G. R. Booth, supra,* different connotation and meaning in the three types of commercial contract,

warehouse receipt or bill of lading, indemnity bond, and indemnity insurance certificate.

Upon these questions, fully presented by the Petition, and the importance of which respondent does not deny, "The results reached have been too different, the opinions too conflicting" in the decisions (Thayer, *Marine Insurance Certificates, supra,* 49 Harv. L. Rev., p. 259). This Court should now review and determine them.

The writ of certiorari should be granted for review of the questions and conflicts presented by petitioner.

Respectfully submitted,

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